

**FILED**  
DISTRICT COURT OF GUAM  
JUL 16 2004  
MARY L. M. MORAN  
CLERK OF COURT

209

) Civil Case No.: 02-00032

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# ORIGINAL

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Plaintiff brings this present motion after numerous attempts to obtain discovery, and for the aggravation and frustration brought about by Defense counsel's alleged improprieties with regard to discovery in particular dilatory and stalling tactics, sanction governed by Fed. R. Civ. P 37 is warranted against Defense counsel for alleged violation and misconduct concerning discovery. Ashtiani alleges that such sanction is appropriate to prevent further misconduct.

LR 26.1 states ("when required in proceeding, only that part of the document which is in issue shall be filed"). documents in issue were covered by Court Order granting Motion to Compel and Defendant obligated to produce and file pursuant to Fed.R.Civ.P 26(e).

1 Defendant's Declaration of Mailing states "Defendnats'  
2 Trial Brief and Defendant's Rule 26 Disclosures" EXHIBIT A.  
3 which only one of the pleadings "Defendants' Trial Brief" was  
4 filed with the Court as to the other document caption  
5 "Defendant's Rule 26 Disclosure" this pleading was not filed  
6 with the Court and contained witness lists and exhibit list  
7 EXHIBIT B. This evasive action violates Fed.R.Civ.P. 26(a)(3)  
8 and Rule 5 and was designed to mislead the court by its caption.  
9

10  
11 Rule 26(a)(3) states ("a party must provide to other  
12 parties and promptly file with the Court").  
13

14 Defendant failure to file witness lists and exhibit lists  
15 pleadings and other papers in Pursuant to Rule 5(d) which states  
16 ("All papers after the complaint required to be served upon a  
17 party together with a certificate of service.  
18

19 Rule (26) 2000 Amendment Subdivision (a)(3). "Disclosures  
20 under subdivision (a)(3), however, may be important to the court  
21 in connection with final pretrial conference or otherwise in  
22 preparing for trial".  
23  
24  
25

1       **Rule (5) 2000 Amendment** Subdivision (d). Disclosures under  
2 Rule 26(a)(3) however must be promptly filed as provided in Rule  
3 26(a)(3).  
4

5       Sanction and Penalties for Noncompliance pursuant to **GR 2.1**  
6 is warranted which states "The violation of or failure to  
7 conform to any of these Local Rules, the Federal Rules of Civil  
8 Procedure shall subject the offending party or counsel to such  
9 penalties, including monetary sanctions and or the imposition of  
10 costs and attorney's fee to opposing Counsel, as the Court may  
11 deem appropriate under the circumstances.  
12

13  
14       Defense counsel on many occasions and continuously failed  
15 to serve Plaintiff documents together with certificate of  
16 service rather, intentionally made me stand in long post office  
17 lines and majority of times with my two children. These  
18 documents mailed separately, forcing plaintiff to one time sign  
19 for certified mail of the pleading and another time for the  
20 certificate of service of the same pleading causing double  
21 travel time for each of their papers which simply could have  
22 been mailed together. Not done so, design to frustrate and  
23 aggravate pro se plaintiff.  
24  
25

1 Based on the Rule 5 alone, sanction appear warranted, not  
2 withstanding Rule 37 and Rule 5, sanction could also be  
3 warranted on Defense counsel's conduct regarding evasive  
4 discovery disclosure.

5  
6 There are only two possibilities, one is that Defense  
7 counsel is ignorant of the rules in the Court that they are  
8 practicing in their profession which is highly improbable or  
9 other possibility is failure to disclose by intent to deceive  
10 and mislead upon the Court. Evasive maneuvering by failure to  
11 make disclosure and cooperate in discovery which The Court Order  
12 overruled the objections of CMI to the discovery request and  
13 Ordered Defendant to produce those documents fully and without  
14 reservation.

15  
16  
17 Rather, Defendant restricted Plaintiff of legitimate  
18 discovery designed to frustrate and aggravate. This conduct is  
19 reckless and malice to any individual under extreme conditions  
20 that was wrongfully terminated as result of retaliation.

21  
22 The purpose of discovery is to allow a broad search for  
23 facts, the names of witnesses or any other matters, which may  
24 aid a party in the preparation, or presentation of his case.

25 469; Maher Engl v. Aetna Life Ins Co., C.C.A.2, 1943, 139 F.2

1 v. pennsylvania R. Co., E.D.N.Y. 1945, Plaintiff requested the  
2 names of witnesses or employer's representative whom were  
3 present at 1 thru 6 level attendance policy. CMI continuously  
4 defends its case based on accountable attendances and even if  
5 that allegation by the Defendant is true, CMI is required to  
6 show that Plaintiff had received warning and counseling as it is  
7 outlined in CMI's own policy and guidelines in regards to  
8 progressive steps of disciplinary action up to termination  
9 warning which are eight steps. These tools were available and  
10 within reach of CMI carefully designed to warn and counsel an  
11 employee if he or she may be developing an attendance. Defendant  
12 departed from it's own policy and did not apply the same rule to  
13 minorities in comparative worth similar to those individual of  
14 the majority in a same classification, Therefore requested  
15 documents are highly relevant. Ashtiani contends minorities  
16 compare to majority were disciplined differently because  
17 minorities were terminated on their first offense. Orbovich v.  
18 Macalester Collage, 119 F.R.D 411, 416 (D. Minn. 1988).  
19 Following the Court of Appeals' rationale in Rich, Supra,  
20 Ashtiani should be permitted discovery of the documents  
21 requested because CMI will be able to rely on the same defense  
22 of this case.  
23  
24  
25

1 The discovery disclosure in pursuant to rule 26(e) and  
2 26(a)(3) not made and were to attempt to deliberately evade for  
3 the purpose of avoiding discovery, consists of party's  
4 disobedience to specific and definite Court Order by failure to  
5 take all reasonable steps within party's power to comply.  
6 ...Court's Orders compelling discovery request due to its  
7 substantial importance.  
8

9 A party may be held in contempt by the court  
10 in which the action is pending for failure to  
11 comply with any discovery order. 4A J. Moore,  
12 Moore's Federal Practice ¶ 37.03[2.-6];  
13 accord United States v. International  
14 Business Machines Corp., 60 F.R.D. 658  
(S.D.N.Y.1973) c.f., Roadway, 447 U.S at 764,  
100 S.Ct. at 2463 (federal courts have  
inherent power to impose contempt sanction).

15 After many attempts by plaintiff as evident in Plaintiff's  
16 declaration in support of this motion. On April 19, 2004 a  
17 meeting was conducted in regards to discovery documents  
18 Plaintiff noticed that responds to discovery requests 7(b) and  
19 24 were not included in documents. Thus, Plaintiff made a note  
20 and was agreed and signed by defense counsel herewith attached  
21 as EXHIBIT C.  
22

23 Plaintiff's first request of the production of documents to  
24 Defendant Continental Micronesia Inc, request 1 thru 6 levels of  
25 attendance "List of witnesses and attendees whom were present at

1 such meetings including employer's representative, employees,  
2 and union representative" EXHIBIT D.

3  
4 Request 7(b) is highly relevant because it is clear course  
5 of this litigation to date that CMI has placed in issue  
6 Ashtiani's attendance and continuously raised allegation of such  
7 defenses in their Motion for summary judgment. In fact,  
8 defendant failure to produce documents by stalling, slip and  
9 sliding, dilly-dallying and finally not providing alleged  
10 attendances documents in conjunction with CMI's termination of  
11 Ashtiani's employment is clearly erroneous. In fact, so blatant  
12 is the error that one can only reasonably conclude that such  
13 justification for termination is due to the fact plaintiff was  
14 discharged following protected activity. ("Merely threatening to  
15 file charge is protected activity"). Giffrod v. Atchison, T.&  
16 S.F.R Co. 1980, CD cal 549 F Supp 1 ("Employer commits unlawful  
17 employment practice by discriminating against employee for  
18 announcing intention to file charge with EEOC") Dec No. 71-  
19 2338(1971) CCH EEOC Dec 6247. This has been only one of the long  
20 series of harassment suffered by me.  
21  
22

23 Ashtiani should be permitted discovery of the documents  
24 requested because CMI will be able to rely on the same in its  
25 defense of this case. ("Discovery is not limited to issues



1 raised in the pleadings, for discovery itself is designed to  
2 help define and clarify the issues"). Jones, supra , 147 F.R.D.  
3 at 250 (citing) Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 437  
4 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed. 2d 253 (1978).

5  
6 Request 24 states " All documents referring or relating to  
7 Mr. Dixon McKenzie and Mr. James Hammer participation or  
8 involvement in decision-making concerning and employee's  
9 employment, including, without limitation, decision relating to  
10 salary, promotion, bonuses, hiring, layoff or firing.  
11 Defendant not producing any documents regarding this request is  
12 ridiculous. It is unworthy of believe that these individuals  
13 were not involved in any decision-making of Ashtiani and or  
14 other minority's termination, layoff, reinstatement or hiring")

15  
16 **EXHIBIT E**. Plaintiff could also establish a prima facie case of  
17 discrimination by offering direct evidence of defendant's  
18 discriminatory motive. See, Schnidrig v. Colombia Mach., Inc.,  
19 80 F.3d 1406, 1409 (9<sup>th</sup> Cir. 1996) In this case Defendant  
20 continuously has prevented plaintiff access to such disclosure.  
21 Rule 37(a)(3) states ("an evasive or incomplete disclosure  
22 answer, or response is to be treated as a failure to disclose,  
23 answer or respond").  
24  
25

1 The Court Order dated November 24, 2003 states  
2 ("Plaintiff's Motion to compel discovery 7b and 24 GRANTED")

3 EXHIBIT F.

4  
5 There is an alarming principle of fair dealing, it appears  
6 that the tampering, delaying and suppression of evidence raises  
7 only a reasonable believe that such evidence would have been  
8 unfavorable to the party responsible for doing it.  
9

10  
11 Rule 37(c) states ("In addition to requiring payment of  
12 reasonable expenses, including attorney's fees, caused by the  
13 failure, these sanctions may include any of the actions  
14 authorized under Rule 37(b)(2)(A), (B), and (C) and may include  
15 informing the jury of the failure to make the disclosure").

16 Rule 37(b)(2)(C) states (" An order strike out pleadings or  
17 parts thereof, or dismissing the action or proceeding or any  
18 part thereof, or rendering a judgment by default against the  
19 disobedient party").

20  
21 Further more, Ashtiani argues that Defendant did not  
22 initiate stipulation to extend subject to Court's approval, such  
23 failure would suggest that Defendant CMI had no intention to  
24 comply with the discovery Order until plaintiff's numerous  
25

1 attempt, Defendant simply should not be allowed to manipulate  
2 the pretrial process through delay tactics.

3  
4 **Supporting Material**

5  
6 This Motion is made on the pleadings and papers already in  
7 file in this matter, on this motion are attached exhibits and  
8 Declaration of Meet and Confer and on what ever argument and  
9 evidence is presented at the hearing of this Motion.  
10

11  
12 **Relief Sought**

13  
14 Tony H. Ashtiani prays:

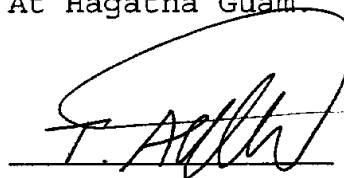
15  
16 1. This Court issue as its sanction against Defendant in  
17 Pursuant to Rule 37(c) and 37(b)(2)(c) by denying Defendant's  
18 Motion for Summary Judgment and rendering a judgment against the  
19 disobedient party for withholding key evidentiary document.  
20

21 2. Plaintiff humbly asks the Court that Plaintiff's Motion  
22 for Partial Summary Judgment be granted and the Court find  
23 judgment in favor of Plaintiff due to Defendant failure to  
24 fulfill its obligation with providing evidentiary material facts  
25 of discovery request subject to this Court's prior Orders.

1  
2 3. Defendant to pay amount \$2,000.00 for time spent  
3 corresponding and finally bringing this motion. ("Trial court  
4 did not abuse its discretion in ordering Defendants to pay  
5 Plaintiff's \$2,000 as compensation for expenses and fees  
6 incurred as result of defendants' failure to produce documents  
7 required by discovery"). Don Marquies v. Chrysler Corp 577 F.2d  
8 624 Id at 641 (9<sup>th</sup> Cir).  
9

10 **Respectfully submitted,**  
11

12 Dated this 16<sup>th</sup> day of July 2004. At Hagatna Guam.  
13

14   
15

16 Tony H. Ashtiani

17 Pro Se, Plaintiff  
18  
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25

**COPY**

CARLSMITH BALL LLP

ELYZE McDONALD

DAVID LEDGER

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Hagåtña, Guam 96932-5027

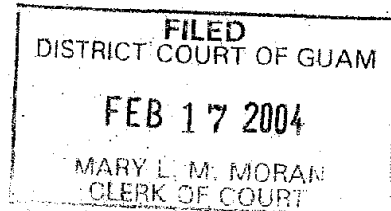
Tel No. 671.472.6813

Attorneys for Defendants

Continental Micronesia, Inc.

dba Continental Micronesia

and Continental Airlines, Inc.



IN THE DISTRICT COURT OF GUAM

TONY H. ASHTIANI,

Plaintiff,

vs.

CONTINENTAL MICRONESIA, INC. dba  
CONTINENTAL MICRONESIA and  
CONTINENTAL AIRLINES, INC.,

Defendants.

CIVIL CASE NO. CIV02-00032

DECLARATION OF MAILING

I, Marissa Leon Guerrero, hereby declare under penalty of perjury of the laws of the United States, that on the 17<sup>th</sup> day of February 2004, I will mail a copy of Defendants' Trial Brief and Defendant's Rule 26 Disclosures, via certified mail with return receipt requested, by depositing same in a sealed envelope with the U.S. Postal Service, addressed to Tony H. Ashtiani, Post Office Box 12723, Tamuning, Guam 96931.

I declare under penalty of perjury (6 G.C.A. §4308) that the foregoing is true and correct.

Executed this 17th Day of February 2004, Hagåtña, Guam.

*Marissa Leon Guerrero*  
MARISSA LEON GUERRERO

**COPY**

CARLSMITH BALL LLP

ELYZE MCDONALD

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Attorneys for Defendant

Continental Micronesia, Inc. dba

Continental Micronesia and

Continental Airlines, Inc.

IN THE DISTRICT COURT OF GUAM

TONY H. ASHTIANI,

Plaintiff,

vs.

CONTINENTAL MICRONESIA, INC. dba

CONTINENTAL MICRONESIA and

CONTINENTAL AIRLINES, INC.,

Defendant.

CIVIL CASE NO. CV02-00032

**DEFENDANTS' RULE 26  
DISCLOSURES**

I. Witnesses (Fed. R. Civ. P. 26(a)(3)(A))<sup>1</sup>

Continental expects to call the following witnesses:

Employees of Continental (Post Office Box 8778, Tamuning, Guam 96931, 647-

6453)

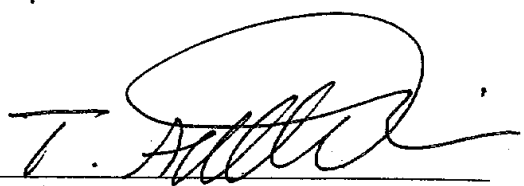
Dixon McKinzie

William Herrera


<sup>1</sup> Continental will not be presenting deposition testimony of any witnesses. See Fed. R. Civ. P. 26(a)(3)(B).

I, Tony H. Ashtiani, hereby acknowledge receipt of documents bate-stamped  
numbered 01385-01448 regarding Tony H. Ashtiani vs. Continental Micronesia, Inc.; District  
Court of Guam Civil Case No. CV02-00032.

Dated: April / 19 / 2004.

  
\_\_\_\_\_  
TONY H. ASHTIANI

I RECEIVED ABOVE DOCUMENTS ALTHOUGH REQUEST #  
[ (FIRST REQUEST OF PRODUCTION OF DOCUMENTS) ]  
7(b) and 24 [ were NOT included with documents  
provided ON APRIL, 19, 2004.

4/19/04 Agreed to: 



3. Copy of all (a) P-160s (b) P-187 of Mr. Dixon McKenzie, Human Resources Director.

4. Copy of all P-160s (b) P-187 of Mr. James Hammer director of maintenance.

5. Plaintiff's statement which was requested by and given to Mr. William Herrera on the evening of June 26, 2001 explaining plaintiff's position relevant to the absence from duty.

6. Copy of the return receipt of the U.S.P.S certified letter (PS form 3811) signed by the plaintiff on July 12, 2001 which contained plaintiff's termination letter dated July 03, 2001 signed by Mr. Herrera.

7. (a) All document of 1 thru 6 levels of attendance records and counseling notice of which were received by plaintiff; (b) list of witnesses and attendees whom were present at such meetings, including employer's representative, employees, and union representative; and (c) the jointly filled out discussion form(s) (which, at the end of each such meeting all parties acknowledged such meeting and signed the mentioned form).

8. Documents of plaintiff's employee evaluation and/or progress reports from defendant's Technical Services Division, where plaintiff worked and employer provided this form during evaluation as plaintiff had acknowledged and signed of employer expectation from the plaintiff (referred to therein as, "employee").

1 showing compensation grade and actual salary for Mr. Mckinzie  
2 and Mr. Hammer.

3 23. All documents, and all files or other collections of  
4 documents, official or unofficial, formal or informal,  
5 maintained or kept by defendant, or by any employee, independent  
6 contractor, representative, or board member thereof, or  
7 otherwise in its or their possession, custody or control,  
8 relating or pertaining to the Mr. Dixon McKenzie and Mr. James  
9 Hammer, including, without limitation, all of their personnel  
10 files, their P-160's, the employees administrative file  
11 maintained by the Human Resources Department and any  
12 departmental or company files.

13 24. All documents referring or relating to Mr. Dixon  
14 McKenzie and Mr. James Hammer participation or involvement in  
15 decision-making concerning any employee's employment, including,  
16 without limitation, decisions relating to salary, promotion,  
17 bonuses, hiring layoff or firing.

18 25. All organizational descriptions or charts reflecting  
19 the defendant's organizational structure, including without  
20 limitation, each individual department's organizational  
21 structure for the period from June 1998 to the present.

22 26. All position descriptions or other documents referring  
23 or relating to the duties and responsibilities of each position  
24 of employment with defendant's organization from June 1998 to  
25 present.

EXH'E"

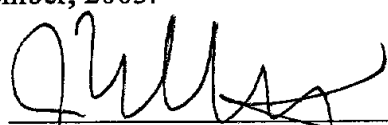
1 FED. R. CIV. P. 37(a). Therefore, the Court DENIES Plaintiff's motion to compel discovery of  
2  
3 Request Nos. 7(a), (c), and 8. However, because complete compliance with discovery requests  
4 requires a party to supplement its response if it obtains additional information sought by the  
5 discovering party, the Court reminds Defendant that, pursuant to Rule 26(e), it has a duty to  
6 further produce these Requests if it finds or later come into custody, control, or possession of  
7 the requested information.  
8

9 **III. CONCLUSION.**

10 For the reasons stated above, the Court decides as follows:

- 11
- 12 1. The Court ORDERS Plaintiff's motion to compel discovery of Request Nos. 3,  
13 4, and 13 GRANTED and ORDERS redaction of employee social security numbers and  
14 salary information contained therein;  
15
- 16 2. The Court ORDERS Plaintiff's motion to compel discovery of Request Nos.  
17 7(b), 9, 24, and 35 GRANTED; and
- 18 3. The Court DENIES Plaintiff's motion to compel discovery of Request Nos. 6, 7(a), (c),  
19 8, 13, and 36, and ORDERS Defendant Continental Micronesia, Inc. to supplement or  
20 amend their responses to these Requests, if needed, pursuant to Rule 26(e).  
21

22 IT IS SO ORDERED this 24<sup>th</sup> day of November, 2003.

23  
24   
25 **JOHN S. UNPINGCO**  
26 **District Judge**

27 Notice is hereby given that this document was  
28 entered on the docket on 11/24/03.  
No separate notice of entry on the docket will  
be issued by this Court.

13

Mary L. M. Moran  
Clerk, District Court of Guam

By:   
Deputy Clerk Date